IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 16, 2009 Session

TIM E. SHAW v. CLEVELAND UTILITIES WATER DIVISION, ET AL.

Appeal from the Circuit Court for Bradley County
No. V-08-611 Michael Sharp, Judge

No. E2009-00627-COA-R3-CV - FILED NOVEMBER 30, 2009

Tim E. Shaw ("the plaintiff") filed this action on August 6, 2008, seeking damages related to a sewer backup that flooded his rental property on August 30, 2005. The defendants all filed dispositive motions arguing that the claims were barred by the one-year statute of limitations codified at Tenn. Code Ann. § 29-20-305(b) (2000)[1] for claims made under the Tennessee Governmental Tort Liability Act ("the GTLA")[2], and the general one-year statute of limitations for personal injury torts codified at Tenn. Code Ann. § 28-3-104(a)(1)(2000)[3]. The trial court held that any and all claims accrued on August 30, 2005, and expired one year later. The trial court dismissed the claims against all defendants as barred by the applicable statute of limitations. The plaintiff appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Tim E. Shaw, Cleveland, Tennessee, pro se.

John F. Kimball, Cleveland, Tennessee, for the appellee, Cleveland Utilities Water Division.

William E. Godbold and Benjamin T. Reese, Chattanooga, Tennessee, for the appellee, GAB Robins North America, Inc.

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[1] In pertinent part, the statute states: "The action must be commenced within twelve (12) months after the cause of action arises." T. C. A. § 29-20-305(b) (2000).

[2] Tenn. Code Ann. § 29-20-101, et seq. (2000 & Supp. 2009).

[3] The pertinent part of the statute reads as follows: "The following actions shall be commenced within one (1) year after the cause of action accrued: (1) Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, breach of marriage promise." Tenn. Code Ann. § 28-3-104(a)(1)(2000).

Linda J. Hamilton Mowles and Preston A. Hawkins, Knoxville, Tennessee, for the appellees, Steve Brown and Patricia Brown dba Servpro of Bradley County aka Servpro of North Chattanooga.

OPINION

I.

We begin with the plaintiff's complaint, filed on August 6, 2008. It states that "all claims . . . against the various defendants resulted from an occurrence which happened on or about August 2005 when the sewer system installed, maintained and provided . . . by . . . Cleveland Utilities, malfunctioned either by failure of maintenance, faulty design, faulty maintenance or improper construction . . . ." Further, the acts are alleged to constitute negligence, gross negligence and willful wanton disregard of the plaintiff. The complaint states that the plaintiff "attempted to cooperate with" Cleveland Utilities "to allow them to remedy the damages" and that Cleveland Utilities

> hired, or directed the defendant, GAB Robins, to come upon the premises of the plaintiff for the purposes of remedying the damages as best that could be accomplished but that GAB Robins grossly, negligently and woefully inadequately failed to perform the necessary remedies and refused to repair the damages or assess the remaining damages and also attempted to conceal certain damages.

After the "inadequate[]" repairs by GAB, plaintiff was allegedly "offered no opportunity or process within which to obtain redress from the City of Cleveland but the City has completely denied further claim for plaintiff's damages and failed to acknowledge the same in bad faith and has failed to be responsible for their negligence." As to GAB, the complaint states that the defendant "acted willfully and intentionally to delay, ignore, failed to respond to requests for payment of rents, failed in like manner to requests for a fair settlement and a request for arbitration, made and/or caused to be made false statements in regard to the claim of the Plaintiff and other acts in violation of T.C.A. § 56-8-101 et seq., generally, and acted outrageously and unconscionably toward the plaintiff to cause him severe emotional distress and financial harm." The plaintiff alleges that GAB was acting as the agent of Cleveland Utilities and that the acts of the defendants, individually, should be "imputed to one another by their relationships." The complaint alleges that the damages were all "the direct and proximate result of the gross negligence of the defendants" and demands damages of $250,000. Servpro is named in the caption but not mentioned by name in the body of the complaint.

Instead of answering the complaint, Cleveland Utilities filed a motion to dismiss or, alternatively, for summary judgment on the basis of the one-year statute of limitations for claims asserted against governmental entities found at Tenn. Code Ann. § 29-20-305(b). The motion was supported by an affidavit showing that the sewer system is operated by the board of public utilities of the City of Cleveland, named in the complaint as Cleveland Utilities. Plaintiff's response to the motion did not deny the nature of Cleveland Utilities' existence but denied that the operation of the sewer system was subject to immunity. Further, the plaintiff's response denied application of the

"one year statute of limitations . . . in light of the fact that the claim had been approved, acknowledged and paid to some extent by the defendants."

GAB filed a motion for judgment on the pleadings on the grounds that all claims were "barred by the applicable statutes of limitations" and for failure, as a matter of law, to state a claim. GAB converted its motion to one for summary judgment by submitting an affidavit of its adjuster, Sharon Segar, who handled the claim. Her affidavit, read in conjunction with the plaintiffs counter-affidavit, furnish the basis for an undisputed time-line of events which we paraphrase as follows:

> 1. The plaintiff promptly reported the problem to David Orr, an employee of Cleveland Utilities. Mr. Orr told the plaintiff to deal with GAB, the insurance adjuster.
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> 2. On October 11, 2005, the plaintiff submitted a demand to GAB for $74,880.
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> 3. On October 14, 2005, GAB rejected the demand in writing and reiterated that it had previously faxed an estimate which represented the amount it would pay for the loss. GAB further advised that it would not be responsible for rental losses after September 30, 2005, except for "additional days for repairs only." The letter from GAB advised that the repairs were the plaintiff's responsibility and that "[w]e can not be responsible for further damages." GAB did state that if the plaintiff encountered damage not included in the appraisal, GAB would consider those damages but would need to inspect the additional repairs.
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> 4. By letter of October 26, 2005, GAB acknowledged receipt of a letter dated October 24, 2005, from the plaintiff and responded that it was attempting to settle the claims made by the plaintiff's tenants and that it had paid Servpro for the clean up which was a line item in the appraisal as well as another contractor for removing cabinets. The letter acknowledged ongoing conversations regarding "any additional damages you are claiming."
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> 5. The plaintiff and one of GAB's adjusters had a telephone conversation on October 27, 2005, wherein the plaintiff expressed his dissatisfaction with GAB's estimate and offer. GAB followed the telephone conversation with a letter dated November 1, 2005, reiterating the amounts GAB would pay on the claim but expressing a willingness to meet "at this building location to discuss damages and repairs."
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> 6. On June 20, 2006, the plaintiff, by counsel, sent a demand in the amount of $48,000 plus lost rent of $750 per month between August

> 2005 and achieving settlement, accompanied by the report of an expert assessing environmental damage. Counsel advised, "We will await your reply for ten (10) days before taking further action."
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> 7. In May 2007 the plaintiff spoke again to Mr. Orr and Orr stated that he would contact GAB and cause them to settle the claim. Mr. Orr did contact GAB and it stated its position in a letter to the plaintiff dated May 7, 2007. GAB stated that it viewed counsel's demand as unreasonable and, when the ten day ultimatum came and went without further contact, it closed its file on the matter.
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> 8. GAB received a letter dated May 17, 2007, sent on behalf of the plaintiff which stated, in pertinent part: "This matter is not resolved. . . . Please advise of GAB['s] intentions."
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> 9. GAB did not respond. The next thing that happened was the filing of the complaint on August 6, 2008.

Segar's affidavit further asserted that GAB is not an insurance company but, rather, an independent adjuster that contracts with insurers and self-insured entities. The plaintiff's affidavit asserted that both Cleveland Utilities and GAB held GAB out as the insurer. The plaintiff also asserted, "They approved my claim." One of the ways the defendants allegedly approved the claim was by undertaking cleanup and demolition.

Servpro filed a motion for judgment on the pleadings and for summary judgment. As grounds, Servpro argued that the plaintiff's failure to even mention it or its conduct in the complaint amounted to a failure to state a claim upon which relief could be granted. Additionally, Servpro adopted the motion filed by GAB and argued that it was at all times acting as the agent of Cleveland Utilities and was therefore subject to the same statute of limitations.

At the hearing held on the various motions, the plaintiff's counsel responded collectively to the motions of the various defendants by first admitting that "the correspondence, the letters, the photographs, the things that [the defendants] have attached to their various pleadings . . . are accurate." Counsel argued that the problem was that the defendants "fail to appreciate what . . . this complaint is about." Later in his argument counsel explained what the complaint is about as follows: "They made an agreement. It's a lawsuit to enforce their agreement to meet the damages in this case."

The trial court complemented the "brilliant legal argument" but held that there was no contract upon which to base a cause of action. The only cause of action was in tort and accrued in August 2005 when the sewage overflowed. The trial court applied the one-year statute of limitations to all defendants, and dismissed the complaint against all defendants. The plaintiff filed this timely appeal.

II.

The plaintiff purports to raise a multitude of issues, most of which were not raised before the trial court, but we believe the dispositive issues are:

> Whether the GTLA statute of limitations for tortuous acts of government employees applies to the claims against Cleveland Utilities.
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> Whether GAB and Servpro can claim the benefit of the GTLA statute of limitations.
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> Whether the complaint fails as a matter of law as to Servpro.
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> Whether the one-year statute of limitations for claims based on personal injury apply to the claims against GAB and Servpro.

III.

Our standard for reviewing summary judgments has been stated as follows:

> Summary judgment is properly entered in favor of a party when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Because summary judgment involves only questions of law and not factual disputes, no presumption of correctness attaches to the lower court's decision. Therefore, on appeal, we review the grant of summary judgment *de novo* to determine whether the precepts of Rule 56 have been satisfied.

Fitts v. Arms, 133 S.W.3d 187, 189 (Tenn. Ct. App. 2003) (citations omitted). A motion for judgment on the pleadings is in effect a motion to dismiss for failure to state a claim upon which relief can be granted. ***Waldron v. Delffs,*** 988 S.W.2d 182, 184 (Tenn. Ct. App.1998). It "admits the truth of all relevant and material averments in the complaint but asserts that such facts cannot constitute a cause of action." ***Id.*** Both the trial court and this court must accept as true "all well-pleaded facts and all reasonable inferences drawn therefrom" alleged by the party opposing the motion. ***Cherokee Country Club, Inc. v. City of Knoxville,*** 152 S.W.3d 466, 470 (Tenn.2004). The ultimate determination of whether the facts alleged make out a cause of action is a question of law. Our review of questions of law is *de novo,* with no presumption of correctness. ***Gunter v. Laboratory Corp. of America***, 121 S.W.3d 636, 638 (Tenn. 2003). The question of which statute of limitations to apply to a given cause of action is a question of law subject to de novo review with no presumption accorded to the trial court's legal conclusions. ***Id***.

IV.

We find no issue of fact or law that precludes summary judgment on any claim brought against Cleveland Utilities. Cleveland Utilities falls within the GTLA's definition of "Governmental entity." *See* Tenn. Code Ann. § 29-20-102(3)(Supp. 2009). It is an "instrumentality of government created by" a "municipality." ***Id***. As a governmental entity, Cleveland Utilities is immune from suit except as expressly provided for in the GTLA. Tenn. Code Ann. § 29-20-201(Supp. 2009); ***Doe v. Coffee County Bd. of Educ.***, 852 S.W.2d 899, 906 (Tenn. Ct. App. 1992). To the extent a claim can be brought against Cleveland Utilities, it must be "brought in strict compliance with the terms of" the GTLA. Tenn. Code Ann. § 29-20-201(c). To the extent the complaint is construed to allege liability on the part of Cleveland Utilities for damages after the fact of the sewer overflow based on the actions of persons who were the "agents" of Cleveland Utilities but not the employees of Cleveland Utilities, immunity is not removed and the complaint fails as a matter of law. *See* ***Lee v. City of Cleveland***, 859 S.W.2d 347, 348 (Tenn. Ct. App. 1993) (must overtly allege that the sewer overflow was the result of the negligent act of an employee acting within the scope of employment to place the claim with the "class of cases excepted by the statute"). To the extent the complaint is construed to allege that the damage was caused by the negligent act of an employee of Cleveland Utilities, it was untimely unless "commenced within twelve (12) months after the cause of action [arose]." Tenn. Code Ann. § 29-20-305(b). The only employee of Cleveland Utilities who is mentioned by name is David Orr. If we construe all facts and all inferences, as we must, in favor of the plaintiff, we conclude that any cause of action arose no later than May 7, 2007, when the plaintiff received GAB's letter explaining that it had closed its file.[4] That letter is the last communication between the parties and was sent in response to the plaintiff's alleged call to Mr. Orr and Mr. Orr's alleged assurance that he would call GAB and make them resolve the claim. Plaintiff's complaint filed in August 2008 was time-barred as a matter of law.

The plaintiff purports to raise numerous issues which we will not address by the numbers. Parts or whole arguments are addressed to waiver of immunity. It is pointless to address those arguments as we have given the plaintiff the benefit of the doubt and assumed that his claim against Cleveland Utilities fell within an exception to immunity. Arguments that Cleveland Utilities is liable for acting as a "licensed contractor," liable for "taking" the plaintiff's property, liable for violation of the Tennessee Consumer Protection Act, and liable for violation of state and federal water quality control acts were arguments not advanced in the trial court, and, for the most part, were not within the scope of the complaint. They are therefore considered waived and will not be heard for the first time on appeal. ***Correll v. E.I. DuPont de Nemours & Co.***, 207 S.W.3d 751, 757 (Tenn. 2006).

We will briefly address the plaintiff's alleged "detrimental reliance on . . . promises which were reasonably expected to induce the Plaintiff . . . to forego legal action." This is akin to an argument that Cleveland Utilities is estopped to rely on the statute of limitations. The position was arguably advanced to the trial court in an oral request to amend. Estoppel prevents the statute of limitations from expiring only for "the amount of time the defendant misled the plaintiff." ***Fahrner***

[4] We do not necessarily disagree with the trial court that the claim against Cleveland Utilities accrued earlier, but we believe it even clearer that the claim accrued no later then May 7, 2007.

v. SW Mfg., Inc., 48 S.W.3d 141, 146 (Tenn. 2001). Once the plaintiff received GAB's letter of May 7, 2007, he could not have been misled about whether his claim was accepted in whole and going to be paid regardless of the amount. Therefore we hold that the trial court correctly dismissed all claims against Cleveland Utilities as barred by the statute of limitations.

Now we must consider whether the GTLA statute of limitations applied to the other defendants. We are not given any reason by either the trial court or the other defendants why the GTLA statute should apply to the claims, if any, against GAB and Servpro. Servpro relies on one case from another jurisdiction where the court allowed a guarantor to assert the statute of limitations defense that was available to its principal. ***Housing Authority of Huntsville v. Hartford Accident and Indemnity Co.***, 954 So.2d 577, 580 (Ala. 2006). The ***Housing Authority*** case falls far short of establishing the rule to which Servpro extrapolates, *i.e.*, that an agent may always assert any statute of limitations available to its principal, even if the principal is a governmental entity. Servpro admits that there are no Tennessee cases for the rule that an agent may assert any defense available to a "governmental entity" principal.

The GTLA shows a legislative intent that the benefits of the Act not extend beyond defined "Governmental entit[ies]" and defined "employees." *See*, *e.g.*, Tenn. Code Ann. §§ 29-20-202 (entity liable for negligent operation of vehicle by employee); 29-20-205 (entity liable for negligent acts of employee); 29-20-313 (if trier of fact determines that defendant claiming benefit of GTLA is not an employee "the lawsuit as to that defendant shall proceed like any other civil case"). In fact, governmental entities are prohibited from extending the benefits of the GTLA "to independent contractors or other persons or entities by contract, agreement or other means . . . ." Tenn. Code Ann. § 29-20-107(c)(2000 & Supp. 2009). Accordingly, we hold that the one-year GTLA statute of limitations does not apply to GAB or Servpro. Thus, unless there is an alternative ground to sustain the dismissals as to these two defendants, we must vacate the trial court's order as to them.

As an alternative to dismissal based on the statute of limitations, Servpro urges us to affirm on the ground that the complaint failed to state a claim against Servpro. The trial court granted Servpro judgment on the pleadings as an alternative ground. As we have previously noted, Servpro is noticeably absent from the body of the complaint. The plaintiff asserts on appeal that all of the actions alleged as to GAB were actually done by Servpro. This is another instance of the plaintiff trying to assert arguments on appeal that were not advanced in the trial court. In this instance, the argument is even inconsistent with the position taken in the trial court. The plaintiff's counsel in the trial court argued that Servpro was only named as a precaution, in case Cleveland Utilities argued, "Servpro took care of it." Cleveland Utilities did not argue, "Servpro took care of it." Counsel also asserted to the trial court that paragraph 9 of the complaint was the paragraph that pertained to Servpro. However, paragraph 9, like all other paragraphs, omitted any mention of Servpro. A complaint which names a company in the caption but fails to recite any "factual allegations regarding the company" in the body of the complaint fails as a matter of law, even for a pro se litigant. ***Young v. Barrow***, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003). In ***Young***, the pro se litigant not only lost his appeal of the judgment granted on the pleadings, but also was held to have prosecuted a frivolous

appeal. ***Id***. at 67. The plaintiff in the instant case was not pro se when his complaint was filed, and is now, according to his signature, a licensed attorney. We hold that the trial court correctly granted Servpro judgment on the pleadings.

We turn now to whether the cause of action, if any, against GAB was time-barred. This depends primarily on which statute of limitations applies. We have rejected any possibility that GAB could claim the benefit of the GTLA statute of limitations. GAB argues alternatively that this case is controlled by ***Heatherly v. Merrimack Mutual Fire Ins. Co.***, 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000) which applied the one-year statute of limitations for personal injury to similar claims. The plaintiff does not challenge the logic or holding of ***Merrimack,*** but argues that it is distinguishable by the fact that GAB actually entered the premises and made defective repairs. The plaintiff argues, therefore, that the four-year statute of limitations for defective improvements to real property controls. *See* Tenn. Code Ann. § 28-3-202 (2000). It is the gravamen of the complaint, and not the plaintiff's characterization that controls. ***Pera v. Kroger Co.***, 674 S.W.2d 715, 719 (Tenn. 1984). We do not consider the gravamen of the plaintiff's case to be one for defective construction.

Given the publication of ***Merrimack,*** we are not writing on a blank slate. Our Supreme Court has instructed that

> published opinions of the intermediate appellate courts are opinions which have precedential value and may be relied upon by the bench and bar of this state as representing the present state of the law with the same confidence and reliability as the published opinions of this Court, so long as either are not overruled or modified by subsequent decisions.

Meadows v. State, 849 S.W.2d 748, 752 (Tenn. 1993). The author of ***Merrimack*** is now on that High Court. ***Pera*** characterized the statute of limitations found in Tenn. Code Ann. § 28-3-104(a) as "the general statute of limitations for personal injury" and proceeded to note a variety of actions that fall within the realm of the one-year statute. 674 S.W.2d at 719. ***Merrimack*** is thus in accord with ***Pera's*** acknowledgment that a range of cases fall within the general one-year statute applied to personal injuries. Accordingly, we will follow ***Merrimack*** unless there is a reason in the facts of the present case to depart from its holding.

Merrimack involved an action brought by two homeowners against independent insurance adjusters hired by their insurance carrier to investigate and adjust a claim for fire damage to their home. The homeowners alleged that the adjusters handled the claim negligently, fraudulently, and in violation of the Tennessee Consumer Protection Act, causing the homeowners to receive less money than they should have. This court granted an extraordinary appeal pursuant to Tenn. R. App. P. 10 to consider the trial court's refusal to dismiss the claim based on breach of contract. When that aspect of the case was resolved by the parties, this court went outside the scope of the issues accepted

for review to hold that any consumer protection claims or claims sounding in negligence were time-barred. ***Id.*** at 915. Without lengthy discussion, we stated:

> Private Tennessee Consumer Protection Act claims and negligence claims must be filed within one year after the cause of action accrues. Tenn. Code Ann. § 28-3-104(a)(1) (Supp. 1999)(time limitations on actions for injuries to the person);Tenn. Code Ann. § 47-18-110(1995)(limitations on private consumer protection actions).

Merrimack, 43 S.W.3d at 916. The present case is very close on the facts to ***Merrimack***. Although the plaintiff's counsel tried to present the case to the trial court as a breach of contract case, there is no allegation of a contract or agreement in the complaint. To the contrary, the complaint alleges that the plaintiff tried to cooperate but GAB "refused to repair the damages or assess the remaining damages. . . ." The complaint specifically alleges that GAB acted "negligently" and that "[a]ll complained of damages herein were the direct and proximate result of the gross negligence of the defendants individually, jointly or imputed to one another by their relationships." Although the complaint in this case does not specifically mention consumer protection as did the one in ***Merrimack***, the plaintiff on appeal argues liability based on consumer protection claims. The plaintiff claims in his complaint that GAB acted in bad faith and that it "acted outrageously and unconscionably toward the plaintiff to cause him severe emotional distress and financial harm." Accordingly, we hold that the present case is controlled by the holding in ***Merrimack***. Any claims against GAB accrued no later than May 7, 2007, and expired before the complaint was filed in August 2008. We have previously held that the complaint failed against Servpro as a matter of law, but we add that, if any claims existed, they were barred by the time the complaint was filed for the same reasons any claims against GAB are barred.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant Tim E. Shaw. The case is remanded, pursuant to applicable law, for collection of costs assessed below.

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CHARLES D. SUSANO, JR., JUDGE